

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2455

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TIMELY PRODUCTS CORPORATION, JACUARY
J. COSTANZO, BENJAMIN M. HINES, and
JOIS D. HINES,

Plaintiffs,
RAPHAEL J. COSTANZO,
Plaintiff Appellant,
v.

CIVIL APPEAL
Docket 74-2455

STANLEY ARRON, VISA-THERM PRODUCTS, INC.,
MAX ARRON and ANNA ARRON,
Defendants Appellees.

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

BRIEF FOR DEFENDANT APPELLEE

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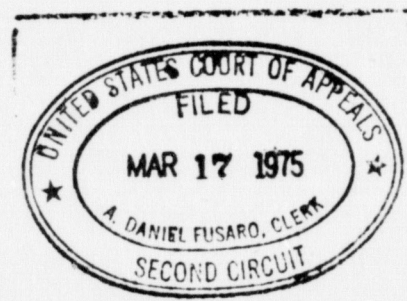


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STATEMENT OF ISSUES

- (1) Was the Arron sock patent #3,392,264 invalid as obvious?
- (2) Was Arron guilty of "unclean hands" in the prosecution of his sock patent?
- (3) Did Timely, by writing infringement letters to Arron's customers, misuse the Costanzo patent?
- (4) Should Arron be awarded attorney's fees and costs upon Timely's failure to prove the anti-trust cause of action? (the fourth cause of action)
- (5) Did Timely tortiously interfere with Arron's contractual relations with Seneca Knitting Mills?
- (6) Was Arron's heater on sale more than one year prior to the filing of the patent application, rendering patent #3,524,965 invalid under 35 U.S.C. Sec. 102 (b)?
- (7) Was Arron's heater patent #3,524,965 invalid as obvious?

"Timely" refers to Timely Products Corporation, Benjamin Hines, its President, and Raphael Costanzo. "Arron" refers to the collective defendants and Arron individually.

STATEMENT OF THE CASE

NATURE OF THE CASE

Timely brought this action against Arron for Infringe-
ment of Costanzo Patent #3,293,405, unfair competition, breach
of fiduciary relationship, misappropriation of trade secrets,
and violation of the Robinson-Patman and Sherman Anti-Trust
Acts. Arron counterclaimed for infringement of his sock
patent #3,392,264, his heater patent #3,524,965, tortious
interference with a contractual relationship with Seneca
Knitting Mills, and abuse of the Costanzo patent. After
trial, Arron sought attorney's fees and costs incurred.

The lower court held:

- (1) Costanzo's patent invalid as obvious against prior art.
- (2) Arron's sock patent invalid as obvious against Costanzo.
- (3) Arron's sock patent if valid, is unenforcible because of "unclean hands" in its prosecution.
- (4) Timely failed to prove the Robinson-Patman, Sherman Anti-Trust claim.
- (5) Costanzo did not prove Arron violated a fiduciary relationship.
- (6) Arron's heater patent is invalid by a public on sale more than one year before the patent application.
- (7) Arron's heater patent invalid against prior art.
- (8) Arron did not prove Timely's infringement letters were sent in bad faith.
- (9) Arron did not prove Timely tortiously interfered with the Seneca contract.

This symbol indicates inclusion in the Joint List of Exhibits.

STATEMENT OF THE FACTS

Costanzo and Arron were equal stockholders in a corporation organized to market a cook-ray stove and hickory smoker, both invented by Costanzo. By December 1964, it became apparent the corporation was not going to be profitable. At this time Arron learned from Robert McCarthy, of the Sonotone Battery Company, of an effort to develop a low-voltage battery-heated sock. Arron¹ returned to Costanzo who began working on a sock-heating element.

McCarthy (of Sonotone Battery) testified (by portions of his deposition being read) that he conferred with Arron around the end of 1964 and with Arron and Costanzo on January 5, 1965 (493)*. He explained he was working on heated socks using 1½ volt D cell batteries. Each sock had two batteries (connected in parallel). Normally, the socks would use one battery, but the second could be connected (in series) thirty or so seconds for "fast warm up" (486). McCarthy told Arron the resistance requirement for the heating element worked out by Sonotone's engineers (576,664). McCarthy's heating element used round wire over a large area similar to the 6 volt sock element (524).

1. Costanzo claims he invented his electric sock in March 1964 and offered his laboratory notebook to prove it. This notebook, discovered midway in the lawsuit, contradicted Costanzo's previous answers to interrogatories (973-996). The trial judge made no finding as to the bona fides of the notebook, but his vigorous examination of Costanzo illustrates the questionable nature of the Costanzo version (1165-1175). The court found Arron and Costanzo were partners in the development of the sock (Mem.22)**, and that Costanzo disclosed the aluminum foil element to Arron without any promise of secrecy (Mem.42).

* Numbers in parentheses refer to pages of the trial transcript.

** Mem. refers to the typewritten pages of the Court's Memorandum of Decision, reprinted in the Joint Appendix.

Arron claimed self-containing the battery was his idea (644), (he started thinking about it in January 1965 after visiting McCarthy (663,668), but the final location was a joint effort with Costanzo (659,660). U. S. Patent No. 3,079,486[#] shows in Fig. 5 a heated sock having an attached pocket for receiving a battery. This patent was issued February 25, 1963, well before any conception date asserted at the trial.

By the time Arron and Costanzo met with Kayser-Roth (March-April 1965), the sock Dx-F1F had been developed (618, 772). It had a large area, U-shape, aluminum foil covered heating element (615). In May 1965, after the Kayser-Roth deal collapsed, Seneca Knitting Mills submitted the sock (Dx-F1F) to J.C. Penney for testing (840,1480). Penney rejected the aluminum foil element (317-20,805). The heat was inadequate and they did not launder well (754). Costanzo disputed this conclusion and refused further development. Arron lacked Costanzo's faith in the aluminum foil element. The partnership foundered on this disagreement (728). The sock described in Costanzo's patent is identical to Dx-F1F.

Arron pursued the heated sock and reduced it to practice (Px-84); 704,731). This model was shown to Emanuel Pillar (President of Alexander Sales, a mail order house), who decided to advertise it (539). In September, Arron also showed it to George Souhan, of Seneca Knitting Mills, who believed it solved the problems of the aluminum foil element encountered the previous May (751). Arron and Seneca executed an exclusive license agreement and Seneca manufactured some socks (Px-9) and published a flyer (Px-52).

Hines and Fattibene, Timely's attorney, learning of these socks, contaced Seneca. Fattibene advised Seneca's Jack Watkins Seneca would be liable for damages if it continued to make the sock. As a result of these conversations, Arron's agreement with Seneca was terminated. (See Point IV). In the spring of 1966, Arron began manufacturing socks under the Visa-Therm name. His socks had an improved heating element construction on which he obtained his heater patent (Px-3;1209).

Costanzo negotiated with Hines during September-December 1965 (366,1254) and granted Hines an exclusive license in December (Px-230. In February 1966, Timely made around 25 pair of socks (Dx-H7) (1356). It changed the heater construction in June 1966 and made about 10,000 pair (191) (Px-4). It again changed its heater construction in early 1967 (Px-5), and again in late 1967 (1664). The change from Dx-H7 to Px-4 was to get more heat in the toe (1344). In June 1966 Timely advertising brochure stated "The construction is changed.....nylon strip over heating element...to allow noticeably greater transfer of heat to the toes..." (Dx-DD10).

POINT I.

OBVIOUSNESS OF THE ARRON SOCK INVENTION

THE PRIOR ART

The most pertinent prior art was a 6 volt sock (Px-325; 1656), typical of the socks manufactured since 1953 (34). Northern Electric Co. was the first manufacturer and at various times it was made by Kemco, Burnham and a Japanese firm (44). It was not patented (41), and not commercially successful. In its best year, around 30,000 pairs were made (52).

Though battery heated, this sock had many disadvantages. It was expensive, uncomfortable, and difficult to manufacture. Because the batteries were worn at the waist, different lengths of wire connecting the battery to the sock were needed for different size wearers. The battery (48,55,1487) provided about three and a half hours of heat (51).

The prior art as applied to Arron includes Costanzo's heating element (Dx-F1F), the 6 volt sock (Px-325), Sonotone's unsuccessful attempts (1485) and the prior art publications. Materials used by both Arron and Costanzo were known. Resistance ribbons were developed in the 1950's, textile material having low heat conductivity was known, aluminum foil to spread heat was known, carbon battery cells were known, as were the longer lasting alkaline cells available in the early 1960's.

The trial court treated the Costanzo and Arron sock patents differently. It found the Costanzo patent obvious and invalid. Arron's invention was not "identically disclosed by the Costanzo patent" (Mem.p.21), although rendered obvious by it (Mem.p.14).

"The heating element in the Arron sock patent is located on the sock 'only on the part that is adapted to underlie the base of the wearer's toes'. The heating element is an 'essentially straight length of electrical resistance ribbon'. The ribbon is covered with 'a material having low heat conductivity to decrease the spreading of heat from the ribbon'. These features of the Arron patent are not specifically disclosed by the prior art."

(Mem.p.19,20)

Arron's testimony (1485-1495,DA*) describes the difference between his invention and the prior art. Prior socks heated a large area in the front part of the foot, basically under the ball of the foot. Arron did the opposite. The area heated was "right under the toes", because Arron realized that when a person complains of cold feet, they mean "my toes are cold" (1488). The user can shift the element slightly to put the toes directly on top of the heating strip for greatest heat, or shift the element to the base of the toes for less heat (1493).

Prior art large area heaters developed temperatures slightly^{2.} above body temperature. Arron's develops 150 degrees or more. Arron's sock is washable. The 6 volt large area sock heated three and a half hours on a large battery (51). Arron's sock obtained the same heating result from a D cell (Dx-F18). Arron's invention cut the cost of the heating element by seventy-five per cent (1491).

*DA indicates inclusion in Defendant's Appendix.

2. Costanzo patent, col. 4, line 22 - "Experience has shown that the temperature required to be generated by the heater need be only slightly greater than that of normal body temperature to keep one's feet warm."

Workers in the art, such as Murphy (Timely expert), testified about the disadvantages of the 6 volt Northern Electric sock. Though essentially a poor seller, the Northern Electric sock was copied by Burnham and Kimco (49). Murphy testified competing companies must have tried to create a new heater rather than copy Northern Electric's concept with its disadvantages (1658 DA). Costanzo copied Northern Electric's large area concept using a slightly different heater construction. Sonotone (McCarthy) followed the same path except he tried thin wire with thin insulation (498,524 DA).

COSTANZO'S PATENT

Arron does not use body temperature heat spread over a large area. Arron's heater neither has nor needs a means for electrically insulating heat conducting strips from the resistance ribbon (Costanzo Patent Claim 2(h)). Arron's socks have no heat conducting strips). That alone avoids infringement. If a single element of a claimed combination is not present, there is no infringement. *Fay v. Cordesman*, 109 U.S. 408, 420; *Electric Protection Co. v. American Bank Protection Co.*, 184 Fed 916,927; *Alex Lee Wallan, Inc. v. J. W. Landonburger & Co.*, 121 F.S. 555, 557; *Svenksav Aeroplan v. Mergenthaler Co.* 161 U.S.P.Q. 257 (C.A. 2d 1969). Costanzo requires electrical insulation because the heat-conducting strips, described as "aluminum foil or the like" (Costanzo Patent Col. 3, lines 64-71) are electrical conductors which, if uninsulated, short circuit the element, rendering it inoperable. Though Arron does not infringe, the Costanzo patent is invalid as to Claim 2, the only claim alleged infringed (138).

Costanzo's aluminum foil sock was conceived and completed around March 1965. Actual prior art charged against Costanzo is the 6 volt sock (Px-325); the use of a low voltage (two 1½ volt D cells) to heat a sock (Sonotone), the concept of supporting the D-cell battery on the sock to make the device unitary and a flat heating element contained within a pocket to heat the front half of the foot (Dx-02). The pertinent publication is the Winchell Patent #3,079,486 (Fig. 5, part of Px-1A).

DIFFERENCES FROM PRIOR ART

Comparing Costanzo's claim 2 with the structure of the 6 volt sock, the differences are: 1) a pocket on the sock for a small battery versus a belt-supported 6 volt battery; 2) flat resistance ribbon versus round wire; and 3) a radiation means of heat-conducting sheets.

The first two differences are so obvious they require no discussion. The third has two possible interpretations. The radiation means are either limited to good heat conductors, "metallic foil 25, such as aluminum foil or the like" (Costanzo Patent, Col.3, lines 64,65) or include all materials, regardless of heat-conducting ability.

If Costanzo's claim 2 is interpreted as to limit the covering material to good heat conductors, Arron, of course, does not infringe. Costanzo copied the large area, front half of the foot 6 volt heater, to attain heat "comfortably distributed for uniform heating" slightly higher than normal body temperature (Costanzo Patent, Col. 4, lines 7-10, 27-28). Spreading heat from a small source over a large area by means of heat-conducting materials was, and is, well known (1422,576).

Costanzo added no new concept to the electrical sock art; he attempted to achieve the 6 volt effect using a D cell battery. His idea not only was unpatentable under 35 U.S.C. Sec. 103, but as the evolution of Timely's heater proves, the 'invention' did not work. Arron, on the other hand, originated a new concept, a narrow band of heat at temperatures too hot to touch at a specific location. Concentration of heat, the opposite of past approaches to the problem, worked. Costanzo's invention described in his patent and Arron's invention described in his, are the measure by which the finding of obviousness is to be tested.

CASE LAW AND ARGUMENT

The Supreme Court, in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966), provided lower courts with a blueprint for resolving the issue of obviousness:

"While the ultimate question of patent validity is one of law, *A. & P. Tea Co. v. Supermarket Corp.*, supra, at 155, the §103 condition, which is but one of three conditions, each of which must be satisfied, lends itself to several basic factual inquiries. Under §103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness of the subject matter is determined."

See also: *Lemelson v. Topper Corp., et al*, 450 F 2d 735; 171 US PQ 705, (C.A. 2, 1971); *Triax Co. v. Hartman Metal Fabricators, Inc.*, 178 USPO 143 (C.A.2, 1973); *Burgess Cellulose Co. v. Wood Flong Corp.* (C.A. 2, 1970) 166 USPO 419.

In *United States v. Adams*, 383 U.S. at 51-52; 148 USPO at 483-4, long-accepted factors which deterred investigation into the combination patented were a major consideration in holding the patent valid. Known disadvantages of prior art, or an inaccurate

conception of physical reality pointing away from the path taken by the inventor, may be taken into account. Arron disregarded the known large area, warm heating elements. Common sense should have told Arron that a high temperature element near the skin was impossible.^{3.}

In *Shaw v. E. B. and A. C. Whiting Co.*, (C.A. 2, 1969), 163 USPQ 580, this court applied the *Graham v. John Deere Co.* test and found the patent valid, reversing the District Judge. Prior art, rather than pointing the way to the innovation, tended to discourage one skilled in the art. Simplicity is not the test of obviousness. Prior art may show the elements, but "There must be evidence that the bringing together of these elements would have been obvious". (emphasis added)

"Hindsight is not a proper basis for determining patentability. Foresight applied as of the date of the invention is the only proper test of the invention, and courts should 'resist the temptation to read into the prior art the teachings of the invention in issue.' *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 148 USPQ 459 (1966); *Shaw v. E.K.B. & A.C. Whiting Co.*, 417 F.2d 1097, 163 USPO 580 (2d Cir.1969); *Dempster Bros., Inc. v. Buffalo Metal Container Corp.*, 352 F.2d 420, 422, 147 USPO 375, 376-377 (2d Cir. 1965)."

Julie Research Laboratories, Inc. v. Guildline Instruments, Inc., et al, 178 USPO 55 (S.D.N.Y. 1973).

"The imitation of a thing patented by a defendant, who denies invention, has often been regarded, perhaps especially in this circuit, as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think."

Kurtz v. Belle Hat Lining Co., 280 F. 277 (2nd Cir.1922).

3. Common sense should have told Arron that a smaller battery would not provide the same heat sensation as the large 6 volt battery.

The trial court treated Arron's invention differently than Costanzo's. It did not conclude Arron's invention was obvious when measured against the same prior art as Costanzo.

"....It is more than likely that the Arron sock patent is obvious in light of the prior art even without the Costanzo reference...."

(Mem. p. 19)

The Court distinguished Arron's invention from Costanzo's. Costanzo's was obvious when measured against pre-Costanzo prior art. Arron's was not.

Conceding the features of Arron's invention were not specifically disclosed by the prior art, the Court, nonetheless, found it obvious when Costanzo was included in the prior art (Mem., p. 14):

(1) Specific location of heating element - In all prior art the heating element covered a large area, (i.e., spread the heat). Arron's contribution was localizing heat, heating a specific area near the extremity. This concept, opposite of anything attempted prior to Arron, made the low voltage sock practical. It concentrated the energy available from the small battery.

(2) Low heat conductivity, heat insulating ability, of the covering material - The covering material in the Arron patent does not have a heat spreading function. It is the means by which the resistance ribbon is fastened to the sock and immobilized so it will not twist in use or washing. They believed direct heat from the resistance ribbon (about 150°F.) was too hot for an application so close to the skin. The use of low heat conducting material was a completely unobvious step. As Timely's sock expert Murphy testified "It doesn't make good sense" (448 DA).

The trial court held, as a matter of constitutional law, a patent, to be valid, must promote the progress of useful arts. U. S. Constitution Art. 1 Sec. 8 (Mem. 3). One can, by this definition, refuse patents to anything but fundamental concepts like the transistor. Not all inventions advance the useful arts in the same degree. Courts who do not favor patents, not only require substantial advance rather than plain advance, they define useful arts as being of planetary significance.^{4.} Ever expanding technology, ever more marvelous feats, minimize the invention of an electric sock. As a result, more and more patents are invalidated.

The separate opinions in *Carter Wallace v. Davis-Edwards Pharmacal Corp.*, 443 F.2d 867 (1971 2nd Cir.), illustrate the controversy is a matter of viewpoint. The majority refused to enjoin an alleged infringer finding it possible, if not probable, the challenged patent (a tranquilizer drug) was obvious. The dissent, applying a different test, cited *Indiana General Corp. v. Krystinel Corp.*, 421 F.2d 1023 (2nd Cir.), cert. den. 398 U.S. 928, 90 S.Ct. 1820, 26 L.Ed.2d 91 (1970). It reached a conclusion^{5.} obviousness would probably not be proved.

The quantum of invention required to avoid a finding of obviousness is difficult to measure. Admittedly, Arron's sock will not be used by every citizen of this nation. It is not a television cathode ray tube, or a space vehicle. It is a non-

4. After twelve trial days the trial judge wondered if all heated socks were not just gadgets (1864).

5. The patent in *Carter-Wallace* had previously been upheld, *Carter Wallace v. Riverton* 433 F. 2nd. 1034, 167 PO 656 (1970) but the majority insisted this latest defendant raised challenges not previously considered.

obvious advance over Costanzo. It means progress for hundreds of thousands of people and provides them with sufficient benefit to entitle the inventor to the protection of the law. It tripled the market for heated socks and commercially replaced the 6 volt sock.

Illustrating again at least two judicial possibilities, the trial judge found it significant Arron's application was initially rejected on Costanzo (Mem., p. 15). A different judge (Mansfield) took a different view of a similar event:

"Following time honored patent office 'action' procedure, the Patent Examiner rejected the initial patent application...."

Carter Wallace v. David-Edwards, supra, at p. 892.

POINT II.

UNCLEAN HANDS AND THE 131 AFFIDAVIT

Arron sought, by filing the 131 Affidavit, a patent office determination Costanzo's application and Arron's application described two separate inventions. If the Patent Examiner believed both applications claimed the same invention, he was required to set up interference proceedings (1718).

Lawyers, like everyone, lack the gift of foresight. Timely and Arron were competitors in the sock market, and Timely was threatening Arron's customers with litigation. It has always seemed, to this writer, obvious Arron's sock does not infringe the Costanzo patent, yet no finding to this effect has, after seven years, been made. Timely garnered the lion's share of the market with litigation or threats of it.⁶ Timely's behavior persuaded most retailers the simplest and easiest course was to buy from Timely Products.

Unfortunately, the patent office determination did not persuade the District Court to grant Arron's motion for summary judgement on Costanzo's charge of infringement. This failure to resolve the question gave Timely benefits of a valid infringed patent without its proving either validity or infringement. Since this lawsuit was pending and by mid-1967 Timely eschewed aluminum foil in favor of Arron's concept, Arron knew

6. Two suits were brought: (1) Timely Products v. Hygrade Cutler, and (2) Timely Products v. Alexander Sales.

when he counterclaimed for infringement of his patent, the Costanzo element would be submitted by Timely as prior art.

The trial court found Arron not guilty of fraud (Mem., p.24).

The trial court found Arron guilty of unclean hands in his dealings with the patent office.

"Taken together, the two alterations and Arron's failure to disclose his relationship with Costanzo indicate that Arron acted in disregard to the duty of frankness he owed the Patent Office" (Mem. p. 27).

The alterations in the letter and sales slip were "clearly of minor importance" (Mem.p. 23). The 131 Affidavit (Par. 3) states the original letter contained only the "typewritten matter" advising the examiner the copy of the letter submitted with the affidavit was not a true copy of the letter in the sealed envelope. The sales slip has a battery stock number "E 95".

The trial court recognized "there seems to be confusion between fraud and unclean hands. The 'but for' effect on the granting of the patent, prerequisite for a finding of fraud, is not required to find 'unclean hands' (Mem. p. 25,26). Citing as authority SCM Corp. v. Radio Corp. of America, 318 F. Supp. 433, 448, 449 (S.D.N.Y. 1970), the opinion continues:

7. The original letter was not submitted because it remained in the sealed, self-addressed envelope.

"Courts seem to have some difficulty in formulating a test for determining whether or no the misconduct of an applicant is of the nature that his patent should not be enforced...."

(Mem., p. 26)

Cases cited by the trial court as supporting its finding of unclean hands are distinguishable from this case. One is diametrically opposed to the proposition for which it is cited. S.C.M. Corporation v. Radio Corporation of America, 318 F. Supp. 433, 448 (S.D.N.Y. 1970), affd. 407 F2d 166, reviewed several patents for electrostatic copying. In one, a 131 affidavit was filed to show conception prior to an application by Thomsen, another R. C. A. engineer. Thomsen conceived his invention and Grieg knew of Thomsen's work before Grieg completed his own invention. Grieg completed his invention before Thomsen filed a patent application. The 131 affidavit did not state Grieg knew of Thomsen's work, which thereby would be part of the prior art. The court found the information irrelevant to a 131 affidavit, holding its sole purpose is to establish a conception date prior to a pending patent application. S.C.M. Corp. vs. Radio Corporation of America, Supra, at p. 463. Accord: Nashua Corp. v. R. C. A., (C.A. 1, 1970) 431 F2d 270.

Inequitable conduct, like obviousness, is a conclusion from specific facts.

"In order for non-disclosure to constitute inequitable misconduct there must be something more than negligence - there must be 'some element of wrongfulness, wilfulness or bad faith that transgresses the basic concept of doing equity.....'"

S.C.M. Corp. v. R.C.A., supra, at p. 463.

Other cases cited by the trial court to support its finding of "unclean hands" are also distinguishable. In Portland Midwest

Co. v. Kaiser Aluminum, 407 F2d 288 (1969 9th Cir.), the patent application incorrectly stated the invention had not been sold in commerce more than one year from the date of the application; Kingsland v. Dorsey, 338 U.S. 318, 319, involved a disbarment, and, on facts more extreme than ours, the dissent is more persuasive than the majority opinion; Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 816, 65 S.Ct. 993, 89 L.Ed. 1381 (1945) refused patent rights to an inventor who adopted a fraudulent patent application as his own.

"Misconduct in the abstract, unrelated to the claim to which it is asserted as a defense does not constitute unclean hands."

Republic Molding Corp. v. B. W. Photo Utilities, 319 F2d 347, 349 (9th Cir.1963) quoted in A.H. Emery Co. v. Marcan Products Corp., 389 F2d 11, 18 (2nd Cir.) cert. den. 393 U.S. 835 (1968).

Affidavits not material to the issuance of a patent cannot be used to overcome the presumption of validity. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U.S. 358, 374, 48 S.Ct. 380, 384, 72 L.Ed 610 (1928). A party applying for a patent has no obligation to provide the patent office with prior art. Prior art not considered by the patent office can, of course, be considered by a court ruling on validity, and its existence detracts from the statutory presumption of validity. Lemelson v. Topper Corp., (C.A. 2) 171 U.S.P.O. 705; Triax Co. v. Hartman Metal Fabrications, Inc. (C.A. 2 1973) 178 USPO 143; 35 U.S.C. Sec. 282. Xerox Corp. v. Dennison Mfg. Co., 322 F. Supp. 963, (S.D.N.Y. 1971).

The issue really is one of obviousness. If Arron is "obvious" when measured against Costanzo, Arron's patent is invalid as

obvious, not as unclean. If Arron is not "obvious", when measured against Costanzo, the acts enumerated by the trial court as "unclean" are immaterial to the issuance of the patent and do not approach the quantum of bad faith needed to deprive an inventor of the fruits of his invention.

ARRON'S CONCEPTION DATE IN THE 131 AFFIDAVIT

The trial court decided Arron did not prove conception prior to September 13, 1965, the effective date of the Costanzo application (Mem., p. 16).

According to Arron's 131 affidavit, the chain of events was:

- (1) The letter of August 23, 1965 outlining his ideas for heating in general.
- (2) During the first two weeks in September 1965 he experimented with the batteries and resistance ribbons and prior to September 13, 1965 he completed a sock using one of the lengths of resistance ribbon previously tested (131 Affidavit, par. 7).
- (3) On September 13, 1965, the date of the Costanzo filing, he tested the sock he made a day or so before (131 Affidavit, par. 8).

The Court found the letter of August 23, 1965 did not contain sufficient information to be a conception letter. It was not submitted as a conception letter. Instead Arron relied on the existence of a completed sock before September 13, 1965 as proof of his conception before September 13, 1965. Deller's Walker on Patents, Sec. 45, pg. 192.

The foregoing does not alter the fact Costanzo's aluminum foil element in DX-F1F was known to Arron and as to him is prior art. It should limit consideration to the fundamental question of obviousness. There was nothing in his procedure before the patent office or 131 affidavit which were not in full compliance with the law and established procedure.

POINT III.

TIMELY'S INFRINGEMENT LETTERS

After Arron had operated for some months, Timely sent infringement letters to his customers (DX-NN1-15). These letters called attention to the issuance of the patent and carried the threat of a lawsuit. Such letters, when sent in good faith, are permitted by statute (35 U.S.C. Sec. 287) and the case law. *U.S. Galvanizing & Plating Equipment Corp. v. Hanson-VanWinkle Manning Co.*, 104 F2d 856, 861-62 (4th Cir. 1939), (Mem. 48).

The trial court held that bad faith is a question of fact, not a matter of law. If one requires testimony from someone overhearing the party charged with bad faith say "I am sending these letters but I know I have no right to do so", the burden of proof is impossibly high.^{8.}

Arron contends his sock so obviously does not infringe the Costanzo patent, the claim that it does, must have been made in bad faith.^{9.} Timely was entitled to send infringement letters in good faith, but issuance of a patent does not require a conclusion that all infringement letters are sent in good faith. If a person reasonably schooled in the arts could not reasonably conclude Arron's sock infringed Costanzo's patent, bad faith is proven.

8. There was testimony that defendant Hines, in January 1966, promised to make Arron and Seneca "cease and desist". (1341, 1342 DA).

9. The trial court was asked to decide this question in Arron's motion to amend under Rule 52 (b).

Timely's conduct illustrated not only a willingness to use threats of litigation to achieve a competitive advantage, it used these threats as it changed its heating element to copy the Arron patent. Malice is shown by the notice to the Lafayette Bank. By no stretch of the imagination could the bank be held liable for contributory infringement. The bank notice (Dx-NN6) served only to embarrass Stanley Arron and demonstrates Timely's motive was to murder Arron economically, not to enforce patent rights honestly believed infringed.

Timely also demonstrated a propensity to sue. It not only sued Alexander Sales, Arron's best customer, thereby obtaining all of Alexander's business (552), it sued the Hygrade Cutlery Company (ED.N.Y. 67C-1132)(1466). The letters and suits had the further effect of persuading potential customers the easiest course was to do business with Timely, especially after the Arron and Timely sock became practically identical. The sporting goods trade knew of this litigation and of Timely's propensity to litigate. The suits and letters affected those who did not receive them.

Timely's liability depends on the reasonableness of its claim of patent infringement. Not only did Arron's sock not infringe, no reasonable man could believe it did infringe (See Point I). Without the reasonable possibility of infringement, Timely's notices were, as a matter of law, given in bad faith, to give Timely an improper and unlawful commercial advantage for which Timely is liable.

This Court in *Bechik Products Inc. v. Flexible Products, Inc. et al* 225 F. 2d 603 (1955) stated:

...The owner of a patent has a right to threaten suits for infringement, provided he does so in good faith. This is not a case in which effort was made to harass or ruin a competitor's business on the basis of claimed patent rights known to be groundless...

Arron's position is that Timely's determination of infringement is clearly so groundless as to, per se, be conclusive evidence of bad faith and misuse of the Costanzo patent. The lower Court's decision, by not investigating if Arron infringed, could not conclude that Timely did not act with bad faith.

The Supreme Court in *Mercoird Corp. v. Mid-Continent Investment Company*, 320 U.S. 661, set forth the length which a patentee may monopolize his invention before misusing his patent stating

The grant of a patent is the grant of a special privilege.. It carries of course a right to be free from competition in the practice of the invention. But the limits of the patent are narrowly and strictly confined to the precise terms of the grant...and denies to the patentee after issuance the power to use it in such a way as to acquire a monopoly which is not plainly within the terms of the grant...

In *Precision Instruments Mfg. Co. v. Automotive Maintenance Machinery Co.* 324 U.S. 806 65 USPO 133 (1945), the Supreme Court in a similar vein recognized that it is of paramount public interest that patent 'monopolies are kept within their legitimate scope'.

In *Ansul Co. v. Uniroyal, Inc.*, 169 USPO 765, this Court said that "the patent laws would seem to authorize him (patentee) to bring such a nonfrivolous suit...". But on the other hand, where a suit is frivolous as here urged by Arron, surely such a suit is not authorized.

POINT IV.

THE ROBINSON-PATMAN, SHERMAN ANTI-TRUST CLAIM

On September 14, 1970, Timely filed a motion to amend its complaint to add a fourth cause of action. This claim alleged Arron violated the Robinson-Patman Act and the Sherman Anti-Trust Act by price discrimination. The original action, for patent infringement, etc., commenced March 1967, and extensive discovery proceedings had taken place. The amendment loosed another round of discovery, sharply contested because Timely sought sensitive information about Arron, his customers, and his pricing policy.

An attorney who brings an action has a responsibility to investigate his client's claims, and his signature on the complaint, theoretically at least, has significance. Canon 30, Canons of Professional Ethics. Plaintiffs' attorney had already been exposed as overzealous when he sued two secretaries employed by Attorney Lawrence Schwartz. They had been dummy incorporators and were listed as officers of the defendant Visa Therm Products, Inc. in its certificate of incorporation. Without investigation, and apparently with no information other than the certificate of incorporation, these secretaries were sued as "infringers". When Arron's mother and father became associated with the corporation to meet statutory requirements, they were substituted as defendants. Arron's father (over eighty years old) was deposed, although plaintiffs knew Stanley Arron alone was responsible for his corporation's activities. No evidence was produced to support any allegation against Arron's parents.

The Robinson-Patman, Sherman Anti-Trust claim was totally unfounded. It was an engine to discover things about the Arron's business Timely had no right to know. It prolonged this suit, enlarged an already sizable record, was expensive to defend, and, when all was said and done, there was an absolute failure of proof. The evidence offered by Costanzo is enumerated by the trial judge in his memorandum at page 43. The lower court's statement of the law is elementary and should have been known to Timely's attorney.

For a lawsuit to fall so short of requisite proof can subject the losing party to an award of attorney's fees and costs. The Court held 15 U.S.C. Sec. 5 provides for attorney's fees to the successful party, and interprets that section to mean the "successful plaintiff", an interpretation consistent with the decisions in this Circuit. See: Annotation Reward of Attorney's Fees in Anti-trust Actions, 21 A.L.R. fed. 750. Potential plaintiffs should not be discouraged from bringing anti-trust suits by the threat of penalty should they fail. This does not mean all such suits, however baseless, can be brought with impunity.

Timely's proof fell so short of the legal principles involved, was so capricious and frivolous, Arron was entitled to attorney's fees and costs incurred for his having to defend that cause of action.

The Supreme Court recently affirmed the equitable power of Federal Courts to award attorney's fees when the interests of justice so require.

"Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons', In this class of cases, the underlying rationale of 'fee-shifting' is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant."

Hall v. Cole, 36 L Ed 702, decided May 12, 1973.

Not only was Timely responsible for a twelve day trial over issues of fact which were essentially undisputed, Timely's assertion of the Robinson-Patman, Sherman Anti-Trust claim demonstrates so great an abuse of the judicial machinery as to render it liable for counsel fees.

POINT V.

TIMELY'S TORTIOUS INTERFERENCE
WITH A CONTRACTUAL RELATIONSHIP

THE SENECA CANCELLATION

After developing his sock, Arron again went to Seneca, this time as an individual, and he negotiated and concluded a contract (Px-49)[#]. John Brett, at the time doing market research for Timely, noticed the Alexander Sales ad in the November 1965 Outdoor Life. Brett told Hines and Costanzo about the ad (1338). Hines asked Brett to write Seneca for information (1340). Seneca replied in December 1965, with a flyer (Px-121C; Px-52; 811). Brett's testimony meant hines knew of the Arron-Seneca sock before he signed the license agreement with Costanzo (1340). Costanzo told Hines Arron had no patent rights and had stolen Costanzo's invention (1341 DA). Hines decided to make Arron and Seneca "cease and desist" (1342 DA). To this end he contracted Attorney Fattibene (1275,1342). Fattibene contacted John Watkins of Seneca and told him there was litigation between Timely and Arron and if Seneca persisted, it would become involved (815). On January 19, 1966, Arron, learning of this contact, wrote Fattibene, copy to Hines (Dx-ZZ9)[#] complaining Fattibene told Watkins Arron "had no rights to license them to make a Heated Sock". Arron's letter stated he was making a different sock than the Penney sock (Dx-F1F); that it was covered by a patent application; that a patent search had been made; that his sock was patentable and did not infringe on any "Patent existing or Pending". Fattibene and Hines, nonetheless, persisted in their contacts with Watkins (814).

John Watkins testified he met Arthur Fattibene, as attorney for Timely, on January 21, 1966 (812-826). He did not remember giving Attorney Fattibene a sock (827). This was three days before Timely became the assignee of Hines (1291). Thereafter, additional meetings with Fattibene and Hines were held (814).

Seneca and Arron did terminate the agreement. Seneca, to avoid the possibility of a claim against it by Arron, wrote it was terminating because Arron did not have the patent rights he claimed (Dx-ZZ1A). Arron did not want to terminate the license (1537), and was so upset he tore the letter up (1482 DA), which accounts for its condition.

Seneca anticipated sales of 100,000 pairs of socks per year (810), which, in retrospect, was realistic, since Timely and Visa Therm have sold at least that amount for the last four or five years (Px-499, Dx-ZZ7). Seneca, a large hosiery mill, probably would have done better. Under the agreement Arron was to receive \$1.20 royalty per pair (1476).

When Timely persuaded Seneca to terminate the agreement with Arron, it had only a patent application on which to base its claim of infringement. Before January 24, 1966, Hines and Costanzo had not made a search to see if sock Dx-F1F was patentable; had not examined an Arron-Seneca sock; knew Arron had a patent application pending (1292); and knew Arron received an opinion his invention was patentable and not infringing (1266).

The lower Court found that Timely did not cause cancellation of the Seneca contract.

...The defendant Arron caused the cancellation himself by accusing the Mill of being unable to produce socks competitively and for not keeping accurate records. These charges were contained in a letter of cancellation written by Arron to the Mill on March 24, 1966 (Px-282).#

The Mill agreed to cancellation but also accused Arron of warranting that he had patent rights in the sock, when he had none.

(Mem. 47)

Arron explained these letters were exchanged at Seneca's request to eliminate the possibility of Arron suing Seneca for breach of contract (1452). As Seneca owed Arron money, Arron had to accede to Seneca's wishes to collect money due him. Arron and Seneca were involved in marketing the sock when Seneca was contacted by Timely. Although Mr. Watkins of Seneca could not recall the exact conversation with Timely, he knew from what was said "...There was a possibility that I could be or Seneca Knitting Mills could be involved in litigation if we continued with Mr. Arron". Immediately after these conversations, the contract with Seneca was terminated because Seneca did not want any "part of anything that was not clean or clear cut". (815 DA)

POINT VI.

"ON SALE" OF ARRON'S HEATER PATENT

The Court held Arron's heater patent invalid under 35 USC §102(b) because a Seneca sock was placed "on sale" more than one year (November 29, 1965) before the effective filing date of the heater patent application (Mem. 34). The "on sale" was a magazine advertisement published a month before the critical date (Mem. 31).

In support of its "on sale" holding the Court cited three prior decisions (Mem. 30) but all three had the invention available for sale and actual delivery to the public before the critical date.^{10.}

The decision in Application of Foster involved a public disclosure, not an "on sale" but the cited portion (Mem. 30) is applicable - "availability to the public" starts the period running. The Seneca sock was not available until after November 29, 1965 (766, 809, 540).

B. F. Sturtevant Co. v. Massachusetts Hair and Felt Co., 124 F.2d 95,97 (1 Cir.1941), cert. denied, 315 U.S. 823 (1942) applies with full force here.

The critical date, then, is not the date when the first Hagen fan was ordered but the date when the order for it was filled....

Accord: Both F. E. Myers and Bro. Co. v. Goulds Pumps, N.Y. 1950, 91FSupp. 475 and Federal Sign and Signal Corp. v. Bangor Punta, Inc. 357 FS 1222, 177 USPQ 737.

10. Amphenol Corp. v. General Time Corp. at 435; Robbins Co. v. Lawrence Manufacturing Co. at 429; and Merry Hull & Co. v. Hi-Line Co. at 55.

The Court further held the November "Outdoor Life" advertisement advertised the Seneca sock. This is unsupported by the record as the Seneca sock did not come into being until after the creation of the advertisement in September, 1965. At the time the advertisement was placed (September 10-15, 1965) Arron only had his reduction to practice sock. The Seneca contract was not executed until September 24, 1965, at least nine days later. The sock advertised in the "Outdoor Life" could not have been the Seneca sock.

In holding Arron's 131 affidavit insufficient, the Court decided Arron "failed to establish a conception date prior to September 13, 1965" (Mem. 19). The advertisement was placed September 10, 1965, or at the outmost September 15 (533,534). These conclusions are inconsistent. An invention not "conceived" cannot have been "on sale".

POINT VII.

THE HEATER PATENT IS NOT OBVIOUS

The decision held that the heater patent obvious and invalid under 35 USC §103, (Mem. 37). Prior art included Arron's sock patent and the Seneca sock (Mem. 36) because of the statutory bar caused by the "on sale" of the Seneca sock (Mem. 35).

As urged (supra Point VI) no statutory bar existed. The Arron sock patent and the Seneca sock are not prior art. Absent this prior art, the Court erred in holding the heater patent obvious as it failed to apply the applicable three point test (Mem. 19).

Arron progressed from the heater construction disclosed in his sock patent to the heating element in the Seneca sock (Px-9) to the finalized heating element disclosed in his heater patent. This construction is used in both Arron's and Timely's commercial sock.

The changes did not alter Arron's concept of localizing the heat (781). The covering material is the same, the resistance strip is the same (1208).

PRIOR ART

Two patents were asserted by Timely as pertinent prior art, Taylor 2,287,915 and Jacobson 2,329,966 (part of Px-2A).

DIFFERENCES

Arron's sock patent shows Stayflex covering the element with overcast stitching extending over the covered element to secure it in the sock. There is in effect no anchoring of the element to the sock to resist tugging on the connecting wires.

While the Seneca sock was an improvement over Arron's first sock, it had anchoring problems because there was only partial anchoring (1210) of the heating element. The covering material was wrapped around and adhesively secured to the resistance strip with a small length of the covering sewed to the sock by one line of stitches. The resistance element floated within the enclosure and would not stay flat, presenting a sharp side to the wearer's foot which could dig into the foot (1209,1496). When the sock was pulled or stretched, it "tended to break" the Stayflex covering so that the element then would not be anchored at all (1496).

Arron's solution to these problems was to fuse the resistance ribbon between two layers of Stayflex with the edges of the Stayflex forming reinforced edges. The resistance strip could not move in the Stayflex covering and was fixed throughout its length to the Stayflex. The Stayflex edges were easily, cheaply and positively stitched with a double needle machine with the two lines of stitching spaced so the heating element was free of the sock between the lines of stitching. The spacing eliminated twisting.

The heating element maintained its position and surprisingly permitted one size of lead wire for all stretch socks (1498). Arron thus had only one layer of Stayflex for the heat to pass through to the foot but a fused, double thickness for the stitching to go through. This construction was so effective and efficient, it was copied by Timely.

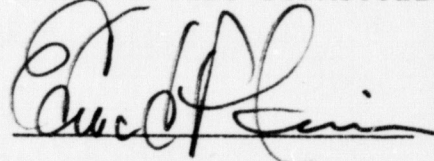
None of the prior art suggest Arron's problem of anchoring the heating element so securely that it could reliably be used in a sock, subject to stretching forces and washing. None of the patents teach that the resistance strip should be adhesively locked between two pieces of covering material so that it cannot move with respect to the pieces; that two spaced lines of stitching be used with the stitching passed through two layers of fused-together thin, flexible insulating material and to have the heating element free of the garment between the rows of stitching. This structure thus has only one layer of covering material between the resistance strip and the foot but yet has reinforced edges through which the stitching passes.

RELIEF SOUGHT

Arron seeks this Court to hold;

- 1) The Arron sock patent is valid;
- 2) The Arron sock patent is enforcible and infringed;
- 3) Timely acted in bad faith in asserting the Costanzo patent to corner the sock market for which Arron is entitled to actual and punitive damages;
- 4) Arron is entitled to attorney's fees and court costs for defending the anti-trust claim;
- 5) Arron is entitled to damages for Timely's tortuously causing the Seneca contract to be cancelled;
- 6) Arron's heater patent invention was not on sale;
- 7) Arron's heater patent is valid.

RESPECTFULLY SUBMITTED



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35 USC §102b. CONDITIONS FOR PATENTABILITY; NOVELTY AND LOSS OF RIGHT TO PATENT.

A person shall be entitled to a patent unless the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.

35 USC §103. CONDITIONS FOR PATENTABILITY; NON-OBVIOUS SUBJECT MATTER.

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

§1.131 AFFIDAVIT OR DECLARATION OF PRIOR INVENTION TO OVERCOME
CITED PATENT OR PUBLICATION.

(a) When any claim of an application is rejected on reference to a domestic patent which substantially shows or describes but does not claim the rejected invention, or on reference to a foreign patent or to a printed publication, and the applicant shall make oath or declaration as to facts showing a completion of the invention in this country before the filing date of the application on which the domestic patent issued, or before the date of the foreign patent, or before the date of the printed publication, then the patent or publication cited shall not bar the grant of a patent to the applicant, unless the date of such a patent or printed publication be more than one year prior to the date on which the application was filed in this country.

(b) The showing of facts shall be such, in character and weight, as to establish reduction to practice prior to the effective date of the reference, or conception of the invention prior to the effective date of the reference coupled with due diligence from said date to a subsequent reduction to practice or to the filing of the application. Original exhibits of drawings or records, or photocopies thereof, must accompany and form part of the affidavit or declaration or their absence satisfactorily explained.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TIMELY PRODUCTS CORPORATION, RAPHAEL
J. COSTANZO, BENJAMIN M. HINES, and
LOIS D. HINES,

Plaintiffs,
RAPHAEL J. COSTANZO,
Plaintiff-Appellant,

CIVIL APPEAL
Docket 74-2455

v.

STANLEY ARRON, VISA-THERM PRODUCTS, INC.,
MAX ARRON and ANNA ARRON,
Defendants-Appellees.

APPEAL FROM A JUDGEMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

APPENDIX FOR DEFENDANTS APPELLEE

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1 announcement to make. Mr. Murphy has been here three days
2 and he has a lot of business appointments, so he told me that
3 it is virtually impossible to be back tomorrow. So for the
4 benefit of defense Counsel, I am sort of informing him that
5 this could be a problem.

6 THE COURT: Does it create a problem for you?

7 MR. JUNKINS: I don't believe so, Your Honor.

8 RECROSS EXAMINATION

9 BY MR. JUNKINS:

10 Q Mr. Murphy, Arron sock patent PX-2 discloses that
11 the covering material may be made of nylon material; isn't
12 that true? I direct your attention to column 3, lines 59-65.

13 A Yes. He says "The covering 39 may be secured to
14 the heating element 38 as by adhesive 40 which is capable of
15 withstanding the temperature of the heating element and also
16 washing conditions. Such a covering is made of fibrous
17 material, such as nylon fibers, that have been matted together
18 to form a fabric and one such fabric which may be employed is
19 sold under the name "Pelon." "

20 Q Would such a material have low heat conductivity?

21 A I think we went through this yesterday. I would
22 assume you gave a value and I said I couldn't argue it
23 because I had made no test. I would assume it has a low
24 value, yes.

25 Q And I believe the last time you testified that

1 "Q And you describe to me how you got the lower
2 resistance?"

3 "A The engineering department got involved and
4 obtained a wire with a thinner insulation on it. See, most
5 wires are made for 250 volts on up. We were dealing with
6 2 and 1/2 volts. We didn't need such heavy insulation. They
7 obtained a wire with very fine insulation and brought the
8 diameter of the whole wire down."

9 "Q This was still a round wire."

10 "A Yes."

11 MR. FATTIBENE: Next page, 13:

12 "Q Wrapped into a insulated, so-called insulated,
13 cover."

14 "A That's right. It still was not the ultimate as
15 we saw the ultimate, but it did suffice for the field test
16 that we wanted to run."

17 "Q Now, did you ever make an actual electric sock
18 according to the ideas that you were trying to foster in your
19 company?"

20 "A Everything except the fine element. We actually
21 put out somewhere between 20 to 24 model units to be tested
22 in the field more or less as a technical test. How did they
23 work, and so on. We distributed them around for no charge
24 to certain people."

25 "Q And when did this occur?"

1 MR. FATTIBENE: Page 70.

2 "Q Now, this sock which has been identified as
3 Defendants' Exhibit Number 3, can you recognize the manu-
4 facturer of that sock at all?"

5 "A No, I cannot."

6 "Q Would this be a sock that could have been produced
7 by Northern Electric?"

8 "A Yes."

9 "Q And would you say that the manner in which this
10 heater is put together in Defendants' Exhibit Number 3 was
11 the type of heater construction that you testified to that
12 Sonotone was using?"

13 "A Yes. And I will expand on that. It also the type
14 used by Northern Electric. In fact, the socks look very
15 much like Northern Electric socks."

16 "Q And the source of power for this particular sock
17 was the large lantern type battery pouch that is carried on
18 the belt?"

19 "A If it is in the original form."

20 "Q Yes. Now, this Defendants' Exhibit Number 2, was
21 this construction shown to you at any time other than today?"

22 "A I don't recall ever seeing that construction
23 before. As I stated earlier, I do not remember seeing the
24 stamped element married to a sock."

25 MR. FATTIBENE: That is all I have, Your Honor.

1 remember exactly.

2 Q Now, do you recall what was discussed at your
3 lunch with Mr. Hines? Is this the Mr. Hines -- pointing
4 to the plaintiff at the table, is that the man you had lunch
5 with?

6 A That's -- I couldn't say for sure. It is
7 seven years ago.

8 Q What did you discuss with Mr. Hines at lunch?

9 A Well, we talked about these heated socks and
10 Mr. Hines explained to me how he had retired from his previous
11 endeavor and he was getting into this and he talked about
12 his marketing plans, and it was a liesurely lunch and, in
13 general, it was along those lines.

14 Q Did he threaten to sue you if you continued to
15 produce Stanley Arron's sock?

16 A I don't think he threatened me. I don't remember
17 exactly what he said, but I knew that from what he said there
18 was a possibility that I could be or Seneca Knitting Mills
19 could be involved in litigation if we continued with
20 Mr. Arron.

21 Q And was the result of these conversations that the
22 contract with Mr. Arron was terminated?

23 A After that, yes. Right. We didn't want any part
24 of anything that was not clean or clear-cut.

25 THE COURT: Are you suggesting that the

41

1 rights, I don't believe; that he owned the patent.

2 Q Did he mention Mr. Arron as his partner?

3 A Yes.

4 Q His former partner?

5 A By name.

6 Q And he mentioned him by name?

7 A Right.

8 MR. KUNIN: Your Honor, I would like to
9 offer ZZ-15 as a full Exhibit.

10 THE COURT: Show it to counsel.

11 MR. FATTIBENE: No objection.

12 THE COURT: Received.

13 (Letter dated 12-28-65 from Hughes to Brett
14 received in evidence and marked Defendant's
15 Exhibit ZZ-15.)

16 Q Now, Mr. Brett, I show you Exhibit H-7 and ask if you
17 can identify this?

18 A This is the Hines sock. Timely Products.

19 Q Now, did you and Mr. Hines have any discussion con-
20 cerning the Seneca Sock that was licensed by Stanley Arron?

21 A Well, when Ben found out that it was the Arron sock,
22 Seneca was behind it, he said he was going to make them cease
23 and desist.

24 Q That is what Mr. Hines said?

25 A Right.

1 Q And do you recall about when he said that?

2 A Mid December.

3 Q That was --

4 A Mid December.

5 Q Did he say what he would do to make them desist?

6 A No. He just said he would make them cease and
7 desist and he was going to talk to his attorney about it.

8 Q Now, did there come a time when you were retained
9 by Benjamin Hines?

10 A Yes.

11 Q And when was this?

12 A We started work for Ben the last two weeks of
13 December and we signed a contract the first week of January.

14 Q And what was the purpose of the contract?

15 A We were to be paid a retainer plus expenses plus
16 ten per cent of sales.

17 Q Sales of what?

18 A The electric sock.

19 Q And was this contract with Mr. Hines personally?

20 A Yes. On his personal stationery.

21 THE COURT: I don't quite follow. You
22 said that you were retained very early in
23 January of 1966 by Mr. Hines although you actu-
24 ally started to work in mid December?

25 THE WITNESS: We started mid December

1 A Yes. I can.

2 Q What is that?

3 A Well, they objected to my cancellation on the
4 grounds that they did not keep full and accurate records
5 because they actually did, and they denied the statement,
6 and then he went on to say that "This is to advise we not
7 only consent to the cancellation of the contract by you, but
8 we cancel the contract on the grounds that you, apparently,
9 do not have the "Patent Rights" referred to in the contract."

10 Q Now, there is a couple of spots missing on this
11 exhibit, DX-ZZ-1. Could you explain that?

12 A Well --

13 THE COURT: A couple of spots missing?

14 MR. KUNIN: Yes. Actually, I could offer
15 the original.

16 THE WITNESS: Well, I was upset.

17 THE COURT: Oh. You mean you are looking
18 at the Xerox and the original of it has some pieces in size,
19 I guess?

20 Q Well, would you explain how the original got in
21 this condition?

22 A Well, I was kind of upset and tore it up and I
23 threw it away. Then I salvaged what I could.

24 MR. KUNIN: Your Honor, I would like to
25 offer this ZZ-1 and 2 as full exhibits.

1 MR. KUNIN: Your Honor, that concludes my
2 portion of the direct, but Mr. Junkins has some questions
3 concerning patents.

4 THE COURT: Well, this is getting to be a
5 strange case each day, but all right.

6 DIRECT EXAMINATION

7 BY MR. JUNKINS:

8 Q Mr. Arron, when you made your invention that
9 resulted in your sock patent, PX-2, can you tell us what
10 battery operated socks you knew about?

11 A Well, I knew about the six volt socks that were
12 made by Northern Electric, Kimco and Burnham. Then I knew
13 of Sonotone's attempts to make a sock. And then, of course,
14 I knew of the aluminum foil heating element.

15 THE COURT: What did you know about
16 Sonotone's attempts? You didn't tell me what they were. You
17 said you knew about these three companies that made the six
18 volt sock, and then you described Sonotone's "attempts".

19 THE WITNESS: Well, Sonotone had everything
20 set except a heating element. Their concept was to use two
21 one and a quarter volt rechargeable batteries in a pack per
22 sock and they had an unusual approach in that they realized
23 that a lot of heat was needed in a sock to make it comfortable,
24 to make the foot comfortable in the cold weather, and they
25 had a pressure switch in their pack so that when the person

1 first put on the sock in order to warm the foot, he would
2 press on the switch and put the two batteries in series and
3 by doing that, the amount of heat was quadrupled and as a
4 protection against a person burning himself with that
5 amount of heat, when he took his finger off the switch, the
6 sock went down to a one and a quarter volt battery operation.
7 And they had that all worked out, but they didn't have a
8 heating unit that was satisfactory. That is when I met them
9 and that is why they were interested in our heating element,
10 I guess.

11 THE COURT: And what else did you know
12 about the six volt, the Sonotone?

13 THE WITNESS: Then, with Costanzo, we had
14 reached the point of the aluminum foil heating element and
15 the expanded radiation concept.

16 THE COURT: Next question.

17 BY MR. JUNKINS:

18 Q With respect to the heating elements of these socks,
19 do you feel they had a common concept?

20 A Yes, sir. They all heated a large area.

21 Q And where would this area be located?

22 A It was all in the front part of the foot.
23 Basically, they were all under the ball of the foot.

24 Q Did you consider these large area heating elements
25 had any disadvantages?

27

1 A Well, they had a lot of disadvantages. They were
2 all bulky, relatively uncomfortable, there were disadvantages
3 in washing them to varying degrees, they used a lot of
4 components, and there were high labor costs. For instance,
5 in the six volt socks, the long length of heating wire had
6 to be sewn with overcast stitching to a piece of cloth which
7 would later be attached to the sole of the sock. That was
8 characteristic of all the six volt socks. Then, of course,
9 with the aluminum foil heating units, the heating unit had
10 to be fabricated. Then you had to make a flap or a cover
11 for it. The heating unit then had to be inserted inside the
12 cover and it floated in there. It was not anchored down,
13 so what you had to do then to keep it from moving and
14 shifting was stitch it down by hand. You couldn't do it by
15 machine. So these all had disadvantages that made them
16 uncomfortable and expensive and not really too practical.

17 Q With respect to comfort, what would cause such a
18 sock not to be comfortable to the user?

19 A Well, the body, the weight of the body goes
20 directly to the feet and if you put something under the load
21 bearing areas, it's either going to be bulky if it's a
22 pocket and if it's a wire with stitching over it, it's bare
23 wire, it's not even covered.

24 Q Did your invention follow the concept of the large
25 area heating element?

1 A No. It did not. I did exactly the opposite.

2 Q And what would the opposite be?

3 A Well, the exact opposite is to heat a small area.

4 Q And did you select any particular area of the
5 foot to heat?

6 A Yes. I did.

7 Q And where was this area?

8 A Right under the toes.

9 Q And why did you select this area?

10 A Well, when people complain of their feet bothering
11 them in the cold, what they are really saying is that "My
12 toes are cold." Usually, there is a sharp, piercing
13 sensation in the toes because the nerve endings restrict
14 from the cold and it happens to be a very sensuous area that
15 respond to the application of heat.

16 THE COURT: How does a nerve ending restrict?
17 What happens when it restricts?

18 THE WITNESS: Well --

19 THE COURT: What do you mean by the ending
20 restricts?

21 THE WITNESS: Well, in the cold --

22 THE COURT: No. My question was: What do
23 you mean when you say "A nerve ending restricts"?

24 THE WITNESS: Well, okay. What happens in
25 the body in the cold is that constricts --

29 1 THE COURT: Just tell me what happens to a
2 nerve. I can visualize a nerve. It looks like a piece of
3 thread. Now, what happens when it restricts?

4 THE WITNESS: Well, in the cold, it --

5 THE COURT: No. Just tell me what happens
6 to this nerve as it restricts?

7 THE WITNESS: Well, it's the blood flow,
8 the vessels that carry the blood --

9 THE COURT: What happens? Does it jump up
10 and down, does it go forward, does it swell up, does it pull
11 back into the foot?

12 THE WITNESS: It's painful.

13 THE COURT: But my problem, Mr. Arron, is
14 I don't know what you mean when you use the word "restricts".
15 I understand what nerve means and an ending, but I don't
16 understand what you mean when you say "the nerve ending in
17 the toes restricts."

18 THE WITNESS: Perhaps I am getting beyond
19 my depth in using medical terms.

20 THE COURT: That is what I thought. Let's
21 go to something else.

22 THE WITNESS: The toes hurt.

23 THE COURT: The toes hurt?

24 THE WITNESS: In the cold.

25 BY MR. JUNKINS:

#)
30

1 Q For the same amount of power through a heating
2 element, can you compare the efficiency of your small area
3 heating element to the large area heating element with
4 respect to the heat received by the user?

5 A What is that again?

6 Q Comparing your small area heating element and a
7 large area heating element for the same amount of power to
8 each heating element, can you compare the efficiency of each
9 heating element in delivering usable heat to a wearer?

10 A Well, when you spread it over a large area, you
11 have a dispersion of heat and you don't have much affect.
12 When you take that same amount of heat that you have been
13 dispersing over a large area and concentrate it, you have a
14 -- you don't have a lot of impact.

15 Q Did your small area heating element have any
16 effect on the relative comfort as compared to a large area
17 heating element?

18 A Yes. It did.

19 Q Did your small area heating element have any
20 effect on the relative washability as compared to a large
21 area heating element?

22 A Yes. It is capable of being washed by hand or
23 gently in a machine without any damage.

24 Q Did your small area heating element have any
25 effect on the relative cost to manufacture compared to large

31
1 area heating elements?

2 A Yes. It eliminated a tremendous -- a lot of
3 components and the ones that are left can be installed with
4 a minimum of labor cost.

5 Q Can you give, for example, a percentage of the
6 change?

7 A Well, on the order of twenty or twenty-five
8 percent of the labor cost and component cost.

9 Q Well, you saved seventy-five percent or --

10 A You would save seventy-five percent.

11 Q So it's seventy-five percent cheaper to install
12 your heating element?

13 A Yes, sir.

14 Q Did your small area heating element have any
15 effect on the relative temperature at which the heating
16 element operated as compared to the large area heating
17 element?

18 A Yes. The large area heaters worked on an amount
19 of heat that was not greatly above body temperature and they
20 provided warmth. I worked on the basis of an intense heat
21 to create a greater reaction and change.

22 Q What was the --

23 THE COURT: Excuse me. I didn't follow
24 that too well. You say the large area heating element arrived
25 at a temperature just slightly above the body heat? Did you

1 say that?

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: And you say yours did what?

4 It's hotter?

5 THE WITNESS: If you put theirs on --

6 THE COURT: No. Did you say yours was

7 hotter?

8 THE WITNESS: Mine is hotter.

9 THE COURT: Yes. How hot?

10 THE WITNESS: Well, at the surface temperature,
11 the element is on the order of 150 degrees or more.

12 THE COURT: 150 degrees?

13 THE WITNESS: Yes, Your Honor.

14 BY MR. JUNKINS:

15 Q What would be the effect produced on a user by
16 your small area heating element as compared to a large area
17 heating element when the socks were worn at room temperature?

18 A Well, at room temperature, the large area heaters
19 feel warm. Mine feel uncomfortable because they are too
20 warm at room temperature.

21 Q What would be the relative effect between the
22 large and small area heating elements when they are worn in
23 a cold environment?

24 A Well, in a cold environment, you have heat loss,
25 and I have a balance there. When the amount of heat loss

1 goes out the bottom of the sock and the shoe, what is left
2 keeps -- what is left keeps the feet comfortable in the
3 cold.

4 Q Is there any advice in yours or Visa-Therm's
5 literature on how to use the socks at different temperatures?

6 A Yes, sir.

7 Q What is this advice?

8 A Well, we tell them that in zero degrees, they can
9 put their toes right on top of the heating strip and if it
10 is 25 or 28 degrees or warmer, that they can just move their
11 toes away from the heating unit.

12 Q Well, where would the heating unit be with respect
13 to the toes when it is moved away?

14 A It shifts slightly behind the base of the toes,
15 just off of it.

16 Q And you advise a user to shift the position to
17 find the most comfortable position?

18 A What they do when these socks are put on, they
19 can be moved with the toes, so the user puts the toe on, then
20 shifts his foot in it, he puts -- excuse me. He puts the
21 sock on, then shifts his toe in such a way that he moves the
22 element to where it is absolutely comfortable.

23 Q Have you ever heard of fast warm-up?

24 A Yes, sir.

25 Q What is it?

1 A Well, fast warm-up means a term I use for
2 describing the use of a lot of heat. For instance, it is
3 desirable when you walk into a warm house from a cold outside
4 in the middle of winter, you get a good feeling from a lot
5 of heat. So I provide fast heat with a lot of heat, an
6 excess of heat, and then when the feet are warm, there is a
7 snap on the sock they disconnect and the heat is usually
8 locked in and will last for quite a while. When they need
9 heat again, they just snap the buttons and they get heat
10 again.

11 Q Did the large area heating element have fast
12 warm-up?

13 A No, sir.

14 Q Is it a very desirable feature?

15 A Well, it's desirable. The only way Sonotone could
16 accomplish it was to use two batteries with a switch that
17 put two batteries in series. I accomplished the same thing
18 with the use of one battery.

19 Q This Sonotone you have talked about is the company
20 that McCarthy worked for and we read Mr. McCarthy's deposition
21 in the record; is that true?

22 A Yes, sir.

23 THE COURT: I am sorry. He said he read
24 the deposition into the record?

25 MR. JUNKINS: Well, it was read. I'm sorry,

1 Your Honor.

2 THE COURT: While I was present?

3 MR. JUNKINS: Portions of the McCarthy
4 deposition were read into the record, Your Honor.

5 THE COURT: On cross examination? McCarthy
6 was here, you know.

7 MR. JUNKINS: I don't believe so.

8 MR. FATTIBENE: No. That was DeMarco who
9 was here.

10 THE COURT: So I am in error. McCarthy's
11 whole deposition was read then?

12 MR. FATTIBENE: Plaintiffs read portions
13 and defendants read portions.

14 THE COURT: Yes. I am sorry. And you
15 started the question referring to the reading of the deposition.

16 MR. JUNKINS: I am trying to relate
17 Sonotone to McCarthy's deposition through this witness, Your
18 Honor.

19 THE COURT: Yes. And I forget what the
20 question was you asked the witness. I interrupted.

21 BY MR. JUNKINS:

22 Q Did Mr. McCarthy work for Sonotone?

23 A He was the assistant product manager for Sonotone.

24 Q And what we have referred to Sonotone socks, we
25 have referred to socks which Mr. McCarthy had mentioned to you?

1 Your Honor, where the company was manufacturing electrically
2 heated socks, I think it is. There may be instances where
3 this would not be so, but in this case, this was vitally im-
4 portant to the success of the company, and one of the individuals
5 cited by the Patent Office was an engineer employed by this
6 company, Mr. Theodore. He worked for the subsidiary known as
7 Electric Parts Corporation, so he was working on these products
8 and if it was not obvious to him, I don't think it would be
9 obvious to anyone else.

10 BY MR. FATTIBENE:

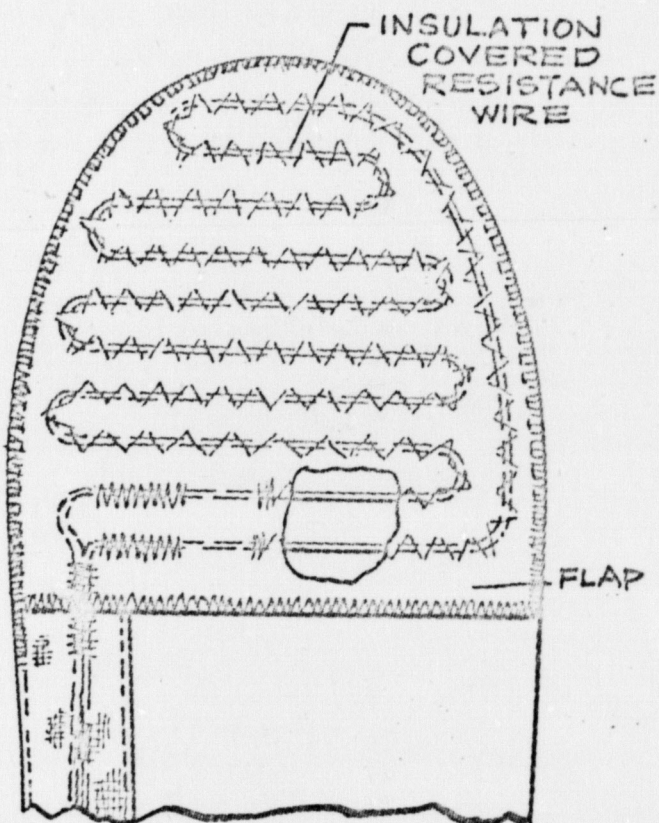
11 Q Now, do you have any other reasons for concluding
12 that the differences between the prior art structures and what
13 Costanzo disclosed would not have been obvious?

14 A Well, I think, basically, this is the primary con-
15 sideration, but there were other companies also in the field
16 and it did not become apparent to them or obvious to them and
17 they were competitors and, obviously, looking for an advantage.

18 MR. FATTIBENE: Now, I would like to introduce
19 another patent as an exhibit. Plaintiffs' Exhibit 311.

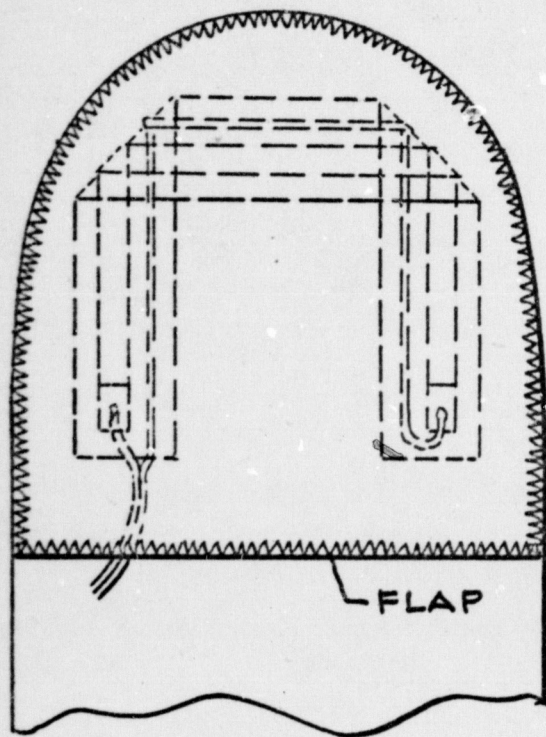
20 MR. KUNIN: Can I ask what the relevance -- I
21 mean, what is this being offered to prove?

22 MR. FATTIBENE: Well, this is being offered to
23 prove that -- this is another reference in which I want to get
24 Mr. Murphy's opinion as to whether or not the Costanzo construc-
25 tion would have been obvious in view of this reference. This

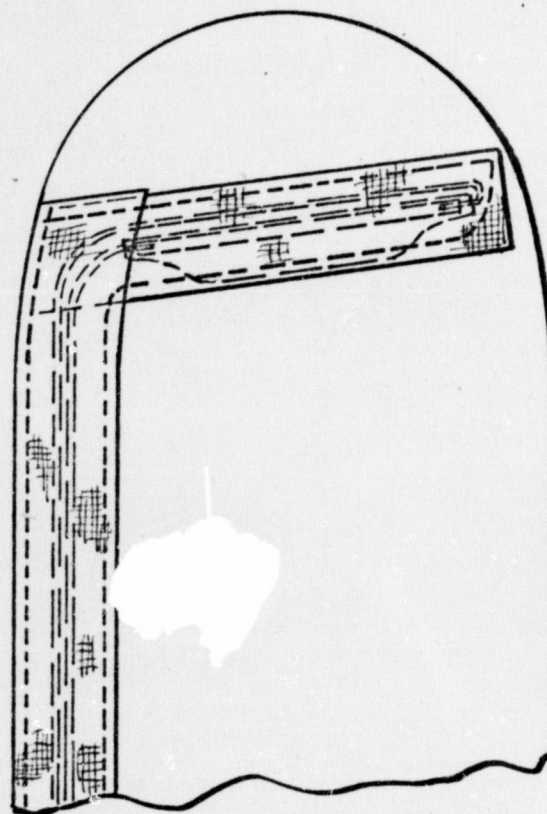


PX-325

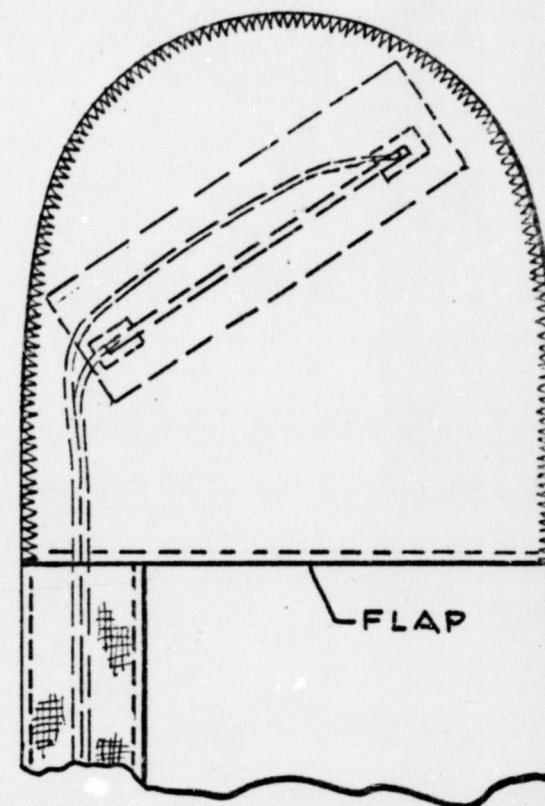
6 VOLT SOCK
PRE - 1964



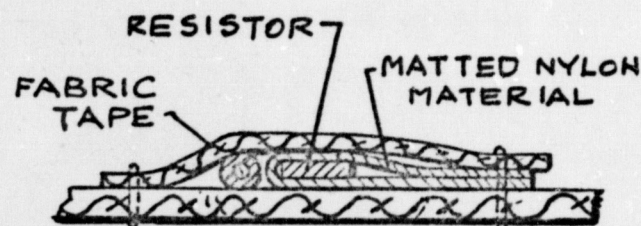
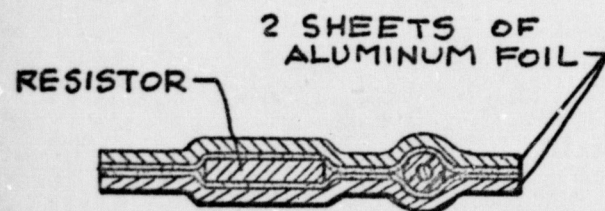
DX-FIF



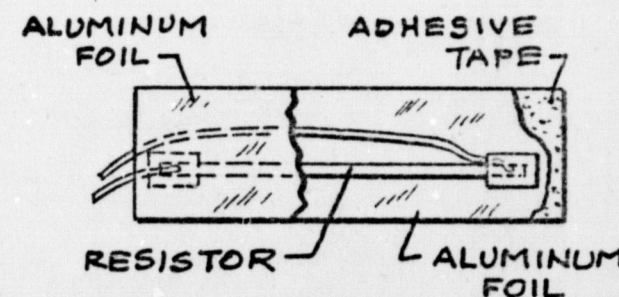
PX-9



DX-H7

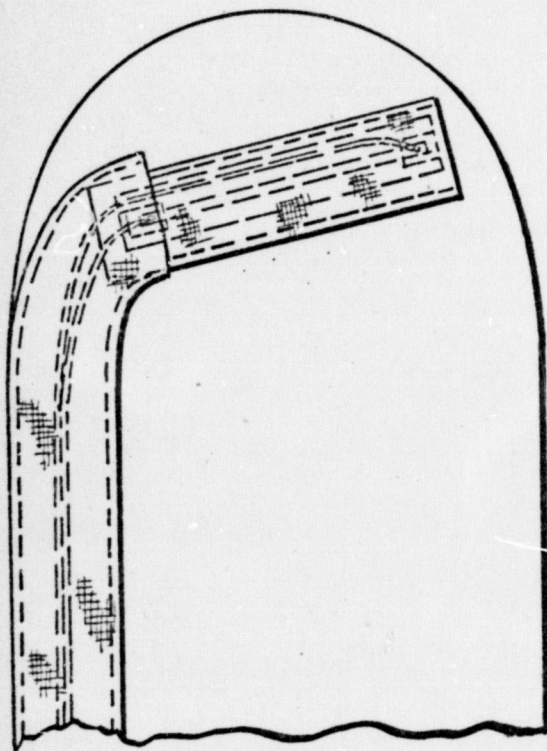


ARRON-SENECA
COMMERCIAL SOCK
JUN 1966

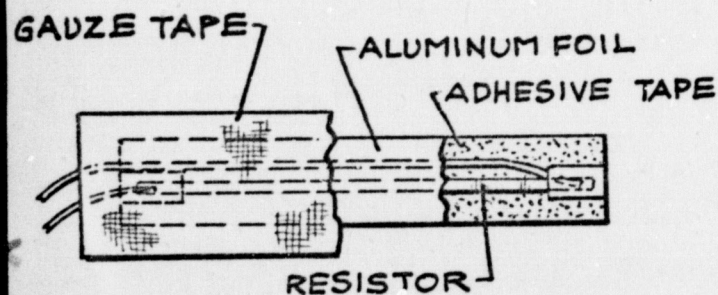


TIMELY 1ST COMMERCIAL
SOCK, EARLY 1966.
(2 SHEETS ALUMINUM FOIL)

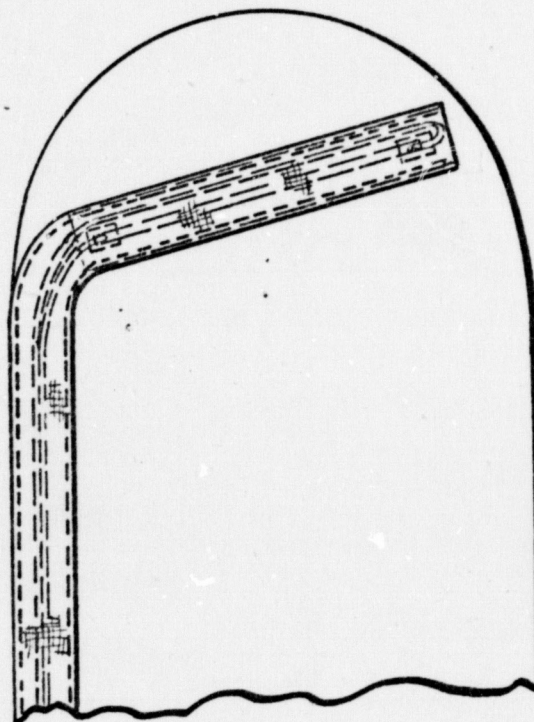
CONSTANZO PATENT SOCK
(REJECTED BY PENNY)
MAY 1965



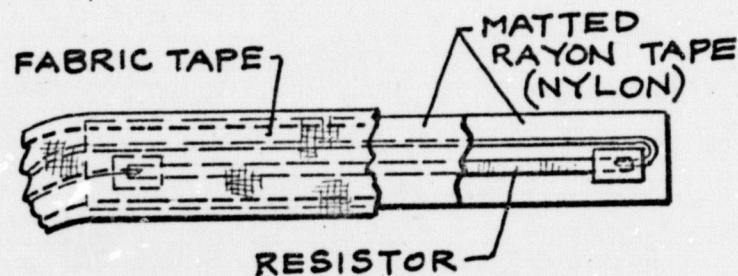
PX-4



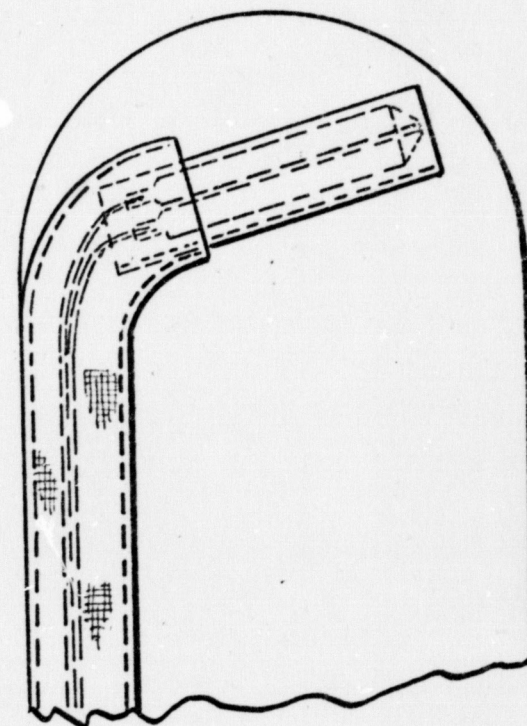
(1 SHEET ALUMINUM FOIL)
TIMELY AND COMMERCIAL
SOCK, LATE 1966



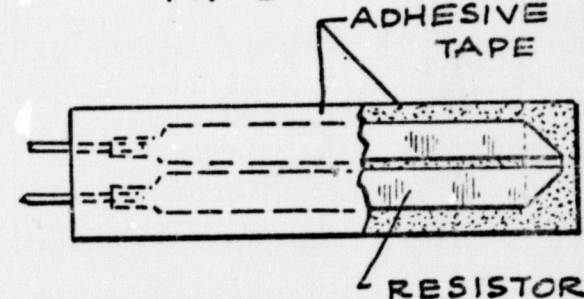
PX-7
(PX-8)



ARRON COMMERCIAL SOCK
LATE 1966 TO PRESENT
(ARRON HEATER PATENT)



PX-5
PX-6



TIMELY COMMERCIAL SOCK
MID 1967 TO PRESENT
(NO ALUMINUM FOIL)



TIMELY PRODUCTS CORPORATION
305 RAILROAD AVE. • BRIDGEPORT, CONN. 06601 • 203-368-531

Dx-DD10

Benjamin M. Hines, President

June 23rd, 1966

TO: ALL SALES AGENTS

SUBJECT: LECTRA-SOX - BULLETIN #2

We have passed on news of certain favorable developments to some of you.....and the purpose of this bulletin is to make sure that all are equally informed.

1. Coverage of U. S. Now Complete

Our first two agents (14 Northeastern and 4 upper Mid-West states) were appointed shortly after the first of the year. We deferred further appointments until trade reaction and sales results showed that, as we all thought, in Lectra-Sox "we really had something."

During recent weeks, we have selected what we believe to be the finest group of agents in the business to cover the rest of the country, and a list is attached for your use in case you have need to get in touch with one of your neighbors who is handling the line.

2. New Package

Most of you have, by now, received samples of the new Lectra-Sox package. It is more dramatic and colorful in design, sturdier in construction than our first carton, and we are enthusiastic over the increased sales impact it is bound to have on both trade and consumer.

3. Improved Socks

The samples of Lectra-Sox just sent you, represent the 1" longer length, tighter weave and heavier weight that will be shipped to the trade on stock orders.

The construction is changed in that the heating element is placed beneath a nylon strip which, our tests confirm, allows a noticeably greater transfer of heat to the toes. (Our premise: Keep the toes warm and you keep the whole foot warm.)

-more-

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of March, 1975
I served, by Registered First Class Mail Return Receipt Re-
quested, 2 copies of this Brief and Appendix on:

Attorney Arthur T. Fattibene
2480 Post Road
Fairfield, Connecticut 06430

Elaine Pollack

Elaine Pollack